Nos. 96-552 and 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

– No. 96-552 –

RACHEL AGOSTINI, ET AL.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

(For Continuation of Caption, See Reverse Side of Cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

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April 8, 1997

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ARGUMENT

POINT I

RESPONDENTS AND THEIR SUPPORTING AMICI FAIL TO SHOW THAT THE ESTABLISHMENT CLAUSE IS VIOLATED BY A TITLE I PROGRAM THAT SERVES PAROCHIAL SCHOOL STUDENTS ON THE SITE OF THEIR SCHOOLS.

Respondents request that this Court reaffirm the holding of *Aguilar v. Felton*, 473 U.S. 403 (1985), but claim to abandon any reliance on the excessive entanglement prong of the so-called "Lemon" test, which was the sole doctrinal basis of the finding of unconstitutionality in *Aguilar*. Resp. Br., pp. 31, 36-37, 46; *Aguilar v. Felton*, 473 U.S. at 409-414. The theories now tendered by the Respondents were adopted by only a single member of the five-member majority in *Aguilar* (473 U.S. at 417-418; Powell, J., concurring), and Respondents support these theories with a portrait of the on-site program as being totally integrated with the parochial school's faculty and curriculum. This factual scenario is unsupported by the record, as are the Respondents' legal theories.

A. Respondents' Description of the pre-*Aguilar* program in New York City and other factual representations in their brief, mischaracterize the record.

We would first note that we do not dispute that virtually all the students served by the Board's non-public school program attend religiously affiliated schools. JA606. This does not mean, however, that the Title I program, either in New York City or the nation as a whole, does not serve a "broad class of citizens defined without reference to religion." Resp. Br., p. 2, quoting from Agostino Br., p. 16. This merely reflects the reality that in New York City, Title I-eligible children tend to be found in either public schools or religiously-affiliated private schools, not in non-denominational private schools. In a Title I program such as Petitioners' which serves a total of

approximately 260,000 students of which almost 240,000 are public school students, it is clear that a broad class of students are being served without regard to religion. JA606.

Turning to Respondents' description of the on-site program, the Board was then unable to provide Title I services if there were too small a number of students to make assignment of a Board professional feasible. JA43.[1] While that circumstance appears to provide no support for any of Respondents' legal arguments, in any event new technology now enables the Board to provide Title I services by computer, even to individual students. JA327-328, JA633, JA637. Fiscal constraints, however, preclude providing Title I services to all eligible students. And, while the principals of the parochial schools were necessarily involved in the identification of Title I-eligible students, eligibility was and is determined on the basis of objective criteria, including surveys submitted to all non-public schools within the City. JA39-42, JA60-61. As for Respondents' claim that selection of students "was in major part determined by the teachers and principal of the [parochial] school," Resp. Br., p. 3, the record shows that while the Title I teachers and other professionals might consult with the parochial school teachers and administrators on the educational needs of Title I-eligible students, the selection of individual students for participation in a program was made solely by the Title I professional, and generally on the basis of standardized tests. JA50-51. While the Title I professionals may have considered the recommendations of the parochial school professionals, JA239, JA242, JA240, the decision was solely that of the Title I professional. JA50-51.

Respondents assert that the Title I professionals were assigned to parochial schools on a voluntary basis, and infer that this enabled Catholic teachers to volunteer to serve at Catholic schools, and Jewish professionals at Hebrew schools. Resp. Br., pp. 3-4. Assignment to the nonpublic school program was voluntary only in the sense that if a Board teacher

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[1] Numerical references preceded by "JA" are to the Joint Appendix.

declined to work in a nonpublic school setting, he or she might refuse an appointment and would revert to an eligibility list. JA48. The selection of the particular school at which the Title I teacher would be assigned was determined solely by the administrator of the Board's Title I program based upon eligible lists and seniority. JA46-48. There is no evidence that Title I professionals were able to manipulate the process to insure that they would teach at a school affiliated with their religion. Indeed, the record evidence indicates that under the on-site program, most teachers taught at schools with a different religious affiliation than their own. JA49-50. The proof further shows that under the present, post-*Aguilar* program, at least 60% of the Title I professional staff is of a religious affiliation different from one or more of the nonpublic schools whose students they serve. JA643.

As for the relationship of the Title I professionals with their parochial school counterparts, it is clear that they consulted and coordinated with the parochial school professionals. Such coordination and consultation is not only necessary as a matter of good pedagogy, it is required by Title I. 20 U.S.C. §§ 6315(c)(1)(C), (E), 6321(b). However, the Title I professionals were instructed not to engage in team-teaching or other cooperative instructional activities with parochial school staff, and there is a binding finding of fact in this case that the Board's Title I professionals scrupulously followed those instructions. JA287-288; see decision of three-judge court in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248, 1267-68 (S.D.N.Y.), *app. dsmd sub nom National Coalition for Public Education v. Hofstedler*, 449 U.S. 805 (hereinafter, "Pearl") (1980). The use of a "team approach" by guidance counsellors or psychologists was obviously a form of consultation. JA212, JA250.

Respondents' argument that under the Title I on-premises program, the Title I professionals were as much a part of the faculty as parochial school teachers, is an argument that Respondents tendered on the prior appeal to this Court, and the briefs of the other parties established that this portrait of the

program had no basis in the record. The assertion, besides being factually unsupported, is inconsistent with the factual findings made in *Pearl*, which are binding on the parties in this case, *Pearl*, *supra*, at 1267; JA287-288. Respondents' scenario was rejected in at least one of the dissenting opinions in *Aguilar* (473 U.S. at 424 [O'Connor, dissenting]), and had the majority adopted Respondents' radical view of the program, the Court in all likelihood would have struck the program down on "effect" grounds. *See*, *Grand Rapids School District v. Ball*, 473 U.S. 373, 386-392 (1985).

The record in this case confirms that, since *Aguilar*, the Board's Title I professionals remain independent of the parochial school faculty. JA643, JA647. It is the Board's staff which determines the content and methodology of the instructional and clinical services provided; the nonpublic school staff cannot dictate the content of, or the methodology used to provide those services. JA647. The Board continues to issue instructions to its professionals to maintain the secular nature of the program, and violation of such directives have rarely, if ever, occurred. JA643-644. As under the pre-*Aguilar* program, the great majority of the Board's Title I professionals provide services at more than one parochial school. JA643. The Board's program continues its "unblemished record" of assuring the secular nature of its Title I program. 473 U.S. at 424-425 (O'Connor, dissenting).

Indeed, in their amicus brief to the Court, the American Jewish Congress suggests that an on-site Title I program would be constitutional, provided the program contained certain protections. They are essentially: full public control over selection and discipline of personnel; full public control over curriculum; access to the program based on objective, nonreligious criteria; and public control of Title I facilities, including the removal of religious symbols. Brief Amici Curiae of American Jewish Congress, *et al.*, p. 19. Under Petitioners' pre-*Aguilar* program, the professionals were fully under the control of, and assigned by, the Board's own Title I administrators. JA44-50. The Board and its employees devised the Title I program and it was administered solely by its

professionals. JA44-46, JA50-55. Teachers were appointed without regard to religious affiliation JA48. Access to the program was determined by non-religious, objective criteria, including the use of surveys, statistics and test results. JA40-44. None of the rooms used for Title I instruction contained any religious symbols, and, in effect, were "a public school within the nonpublic school." JA59. The present program has not changed in any significant manner, and remains secular. JA606-607, JA643-646. Should the Court permit the Petitioners to resume an on-premises program, we shall again assure that classrooms will be cleared of all religious artifacts during Title I instruction, and that personnel, selection of students and curricula will be determined by Board personnel, as has been done for the past thirty years. JA342, JA643-646.

Respondents' cavalier treatment of the facts also infects their discussion of aspects of the post-*Aguilar* program in New York. While Title I, non-public school enrollment decreased drastically after the *Aguilar* decision, there is no evidence that the principals of the parochial schools exercised a veto power over their students' participation at public school sites. Rather, the principals were objecting to the loss of instructional time and expressing concerns for safety from criminal activities and traffic; the principals were obviously articulating the concerns of the students' parents. JA317. Furthermore, what Respondents do not state is that because of subsequent overcrowding in the public schools, the public schools are a dwindling source of space for non-public school Title I students. JA374-464, JA713.

Respondents' description of the administrative and financial burdens of complying with *Aguilar* contain similar misstatements. The MIU's are generally not parked directly in front of the school entrance, but are parked on the same block or around the corner; they are never parked on private school property. JA627. Respondents claim that the time to go to and from an MIU would consume no more than a normal ten-minute recess between classes. Resp. Br., p. 10. However, most nonpublic school students receiving Title I services are in the elementary school grades where there are no regular

class changes or recess between classes. JA721. Thus what Respondents treat as recess is actually instructional time, which is lost in travelling to and from public school sites, leased sites and MIU's. JA330, JA721.

Finally, Respondents purport to establish that the financial burdens from the post-*Aguilar* program are exaggerated, selectively quoting from certain language in a memorandum of law submitted by the Petitioners in another litigation in which Respondents' counsel, as lead counsel, sought unsuccessfully to have the present, off-site program declared unconstitutional. Resp. Br., pp. 10-11; *see, Committee for Pub. Educ. & Religious Liberty v. U.S. Dept. of Educ.*, 942 F.Supp. 842 (E.D.N.Y. 1996) (hereinafter, "Pearl II").[2] In that case, Plaintiffs urged that the Petitioners were violating the Establishment Clause by financially favoring parochial over public school students. The cited language, a response to a legal argument predicated upon a statistical analysis, was merely an attempt to show that the cost of complying with *Aguilar* was proportionately a small part of the entire Title I program in New York City. It was by no means a concession that the fiscal impact of complying with *Aguilar* was not substantial.

B. Respondents have not shown that the Petitioners' Title I program results in a direct subsidy to the parochial schools or that the program in any other way violates the Establishment Clause.

Respondents assert three theories by which the Board's program violates the Establishment Clause. Two need no extensive response. The "symbolic union" is necessarily related to Respondent's perception of the program, which we have shown to be both exaggerated and incorrect. Whatever the appropriateness of applying the "symbolic union" analysis under some different program (*see*, *Grand Rapids School*

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[2] The Plaintiffs' appeal to the Court of Appeals in Pearl II has been withdrawn, without prejudice, pending resolution of this case.

District v. Ball, *supra*, 473 U.S. at 389-392), Justice O'Connor supplied the appropriate response to Respondents:

> New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students. In light of the ample record, an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished schoolchildren are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

473 U.S. at 425 (footnote omitted).

For the same reasons, Respondents' "prophylactic" argument, also premised on a mistaken view of the record, must be rejected. As Justice O'Connor also explained in her dissent, in a section joined by the Chief Justice, experience has rebutted the Court's assumption that professional, publicly-employed educators would begin to inculcate religion once allowed to enter the premises of parochial schools. *Id.*, p. 427, criticizing part V of *Meek v. Pittenger*, 421 U.S. 349, 367-373 (1975). The record of this case is part of that "experience" and establishes that an on-premises program should not be forbidden based on speculation totally at odds with that record.

Finally, the on-premises program did not, and if reinstated, would not result in a direct subsidy to the parochial schools. We first note that some of the amici have misread our

position. Petitioners Chancellor and Board of Education have not urged that the principle of neutrality may support a direct subsidy to parochial schools. Rather, our position is that under Title I, and specifically under the Board's program, the direct benefit is to the child, and is made without regard to his or her religious affiliation. Brief for Petitioners Chancellor and Board of Education, pp. 29-30. Any benefit to the parochial school is not direct but attenuated. Id., p. 30. Furthermore, while Respondents do not attack Title I itself or the services provided, but only their on-site provision, any benefit to the parochial schools is traceable to the services, whether provided on or off the premises of the parochial schools. Resp. Br., p. 1.

The "benefit" to the parochial schools flowing from the Title I aid to the student is no more direct than the benefit to the parochial school in *Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1 (1993) or the Christian college in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); certainly those schools benefited as much from the availability of a sign-language interpreter for a deaf student (*Zobrest*), and from vocational rehabilitation services for a blind student (*Witters*) as any parochial school would benefit from remedial educational services for its Title I-eligible students. The fact that a larger number of students may be receiving benefits is not determinative or change the analysis. This Court has upheld programs providing aid to large numbers of students, including parochial school students, where the benefit to the parochial school is not direct. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (transportation reimbursement); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Respondents' assert that the Board is "supplanting" the regular curriculum by allowing the parochial schools to concentrate on other students and relieving them of the duty to provide the remediation. Resp. Br., pp. 6, 42. However, if a parochial school were to cease providing remediation it had provided in the past, it would be in violation of the Secretary's regulation. 34 C.F.R. 200.12(a) (1996). Furthermore,

the evidence in the record shows that the parochial schools are not financially able to provide such remedial services and did not provide them in the past. JA660-661; JA685-686. As for the ability to "proceed with the instruction of the rest of the class" Resp. Br., p. 6, the Title I services are intended to supplement and reinforce the regular classroom instruction, not supplant it. JA331. Thus, for example, a student is not removed from a regular mathematics class to receive remedial mathematics. JA621.

The cases on which Respondents and amici place greatest reliance are clearly distinguishable. In *Grand Rapids School Dist. v. Ball*, *supra*, 473 U.S. 373 (1985) the record contained evidence of the kind of subsidization of the parochial schools not present here. In particular, the Community Education program operated like an adjunct of the parochial school, with the courses taught by instructors who were full-time employees of the parochial schools. 473 U.S. at 399 (O'Connor, concurring in part, dissenting in part). As for *Meek v. Pittenger*, *supra*, 421 U.S. 349, the "auxiliary services," including remedial services, were merely a part of an overall plan obviously intended to aid parochial schools. *Id.*, p. 352-355. The programs in these cases, as in *Lemon v. Kurtzman*, 403 U.S. 602 (1970) were all state programs intended to give financial assistance to parochial schools. Under the circumstances, those programs, unlike Title I, could be described as involving direct subsidies to the parochial schools. *Zobrest v. Catalina Foothills School District*, *supra*, 509 U.S. 1, 12 (1993).

Respondents finally complain that they should be allowed further inquiry into the operation of the Board's program. Resp. Br., p. 42. However, in Pearl II, in which the present, post-*Aguilar* program was upheld, the District Court explicitly found that the parochial schools would not have provided the remedial services on their own. 942 F.Supp. at 866. Furthermore, in Pearl II, Respondent's counsel had an opportunity to obtain disclosure from all parties to this action, and did obtain extensive discovery as to the operations of the Board's program. JA605. The facts as to the Petitioners' program have

been fully developed and considered in this case, in Pearl and in Pearl II. There is no need for further discovery or any further inquiry into the facts.

POINT II

RESPONDENTS AND THEIR SUPPORTING AMICI FAIL TO SHOW ANY CONVINCING REASON WHY THE COURT SHOULD NOT RECONSIDER *AGUILAR* ON PETITIONERS' RULE 60(B) MOTION.

The central theme underlying the Respondents' Rule 60(b) argument is that consideration of the merits on our motion will encourage obstinate litigants in other cases to seek to return to this Court and overturn a prior decision. Resp. Br., p. 23; see also, Brief Amicus Curiae of Americans United for Separation of Church and State, et al., p. 6. However, this case does not involve the resolution of some commercial or other private dispute which must be given finality. It involves not only the Board of Education but the Secretary of Education with responsibility for a national federal program, and a continuing permanent injunction. We rely not on some isolated dicta but on the clear statements of a majority of the Court calling for reconsideration of *Aguilar*. Thus consideration of whether *Aguilar* should be overruled does not threaten judicial stability. Any frivolous 60(b) application can be easily and effectively dealt with by the district court. *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 19 (1976). The only question is whether it should be decided here or in some other case, and Respondents and their supporting amici present no convincing basis for delaying resolution of an issue that affects a nation-wide program, while the Court awaits such a case. Indeed, Respondents and the amici fail to cite any case which might raise the *Aguilar* issue for this Court in the context of a Title I program. The Court should reach the merits.

CONCLUSION

THE ORDER OF THE COURT OF APPEALS SHOULD BE REVERSED SO AS TO GRANT THE PETITIONERS' RULE 60(B) MOTION AND VACATE THE INJUNCTION.

Respectfully submitted,

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